No. 92-1207

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

STATE OF MARYLAND,

Petitioner,

v.

ANTHONY GRANDISON, SR.,

Respondent.

On Petition For Writ Of Certiorari
To The Circuit Court For Somerset County, Maryland

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, ARKANSAS, CONNECTICUT, FLORIDA, HAWAII, ILLINOIS, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, WASHINGTON AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the new rule of *Mills v. Maryland*, 486 U.S. 367 (1988), satisfies the second exception to the *Teague* doctrine and may therefore be applied retroactively on collateral review.

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INTEREST OF *AMICI*

In *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny, this Court recognized the limited role of federal habeas review by establishing a general principle barring the retroactive application of new rules on collateral review. This holding reflects the criminal justice interests in finality and comity and the validation of reasonable, good-faith state court determinations.

This case presents an important question concerning the availability and application of the *Teague* doctrine. The central issue concerns the scope of the second exception to the *Teague* doctrine and whether that exception may swallow the general principle established by *Teague*. *Amici* States have a substantial interest in protecting presumptively valid and final state court convictions and sentences from collateral attack on the basis of new rules which were unavailable at the conclusion of the direct review process.

This brief is submitted by *amici* through their respective Attorneys General in accordance with Rule 37.5 of the Rules of the Supreme Court.

STATEMENT OF FACTS AND PROCEEDINGS

A federal indictment charged respondent Anthony Grandison, Sr., with narcotics violations. While Grandison was incarcerated pending the federal trial, he hired Vernon Evans, Jr., to kill two witnesses who were to testify for the government. On April 28, 1983, Evans shot and killed one witness and the sister of the other, mistakenly believing her to be one of the government witnesses.

On June 30, 1983, the State of Maryland charged Grandison with the murders, and subsequently notified him of its intention to seek the death penalty on those charges. Additionally, the United States had charged Grandison with federal witness tampering and criminally violating the federal civil rights of the witness. While the State murder charges were pending trial, Grandison was convicted in federal court on the original narcotics charges and the subsequent witness-related charges and sentenced to twenty-one years on the narcotics charges

and life imprisonment plus ten years. In state court on June 6, 1984, Grandison, *inter alia*, was convicted and sentenced to death on two murder counts. The Court of Appeals of Maryland affirmed the state convictions and sentences. *See Grandison v. State*, 305 Md. 685, 773, 506 A.2d 580, 624 (1986).

The direct review process was concluded on October 6, 1986, when this Court denied Grandison's petition for writ of certiorari. *See Grandison v. Maryland*, 479 U.S. 873 (1986). Subsequently, this Court struck down a requirement that a jury must first *unanimously* find the existence of a mitigating factor before it could consider the specific mitigating evidence in issue. *Mills v. Maryland*, 486 U.S. 367 (1988).

In a state post-conviction proceeding, Grandison argued that *Mills* error required reversal of his death sentences. The Circuit Court for Somerset County, Maryland agreed. The state court found that although *Mills* constituted a "new rule," within the meaning of the *Teague* doctrine, *Mills* should be retroactively applied under the second exception to the *Teague* doctrine. *Maryland v. Grandison*, No. 4010, slip op. at 16-19 (Somerset County Circuit Court July 31, 1992), *reprinted in* App. to Pet. for Cert., at 15a-16a. This holding was directly premised upon *Williams v. Dixon*, 961 F.2d 448, 454-56 (4th Cir.), *cert. denied*, 113 S.Ct. 510 (1992), which held that *Mills* satisfies the second *Teague* exception. The Court of Appeals of Maryland denied the State's application and Grandison's cross-application for leave to appeal on other grounds. *See* App. to Pet. for Cert., at 45a. Maryland now seeks review by this Court.

REASONS THE WRIT SHOULD ISSUE

I. The Broad Application of the Second Exception Threatens to Undermine the *Teague* Doctrine, Disrupting the Important Federalism and Criminal Justice Interests in Finality, Predictability, and Comity

a. Introduction: The Vital Role of the *Teague* Doctrine

The *Teague* doctrine establishes a fundamental general principle: On collateral review, a petitioner may not obtain the retroactive application or announcement of "new rules" (i.e., rules which are not dictated by prior precedent or which break new ground or impose a new obligation on the States). This doctrine advances the federalism and criminal justice interests in finality, predictability, and comity by emphasizing the limited role and function of federal habeas review in our criminal justice system.[1]

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[1] *See Teague*, 489 U.S. at 306, 308, 312 (plurality opinion); *see also Saffle v. Parks*, 494 U.S. 484, 488 (1990); *Butler v. McKellar*, 494 U.S. 407, 413 (1990).

Of course, new rules may be established during any part of the direct review process. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987); *see also Teague*, 489 U.S. at 304 (plurality opinion). After the direct review process the state court conviction is presumptively final and valid, *see, e.g., Barefoot v. Estelle*, 463 U.S. 880, 887 (1983), and different criminal justice interests are implicated by the question of retroactive application of new rules. As Justice Harlan first noted, and this Court has reiterated on several occasions, "The relevant frame of reference [on the retroactivity question] is not the purpose of the new rule whose benefit the [defendant] seeks, but instead the *purposes for which the writ of habeas corpus is made available.*" *Mackey v. United States*, 401 U.S. 667, 682 (1971) (emphasis added) (Harlan, J., concurring in part and dissenting in part) (quoted in *Sawyer v. Smith*,

Significantly, the *Teague* doctrine does not create an *absolute* bar against the retroactive application of new rules on collateral review. The general principle established by the *Teague* doctrine may be overcome when the new rule falls within one of two "narrow" exceptions.[2] These exceptions allow for the retroactive application of new rules under the narrow circumstances when it may be warranted. However, when either of the two exceptions applies, all of the principles advanced by the *Teague* doctrine are disrupted, including the criminal justice interests in finality, comity, and predictability,[3] and the validation of reasonable, good-faith determinations of federal rights by state courts.[4] The central issue, therefore, is when, and under what showing, these identified criminal justice interests may be subjugated to other ends.

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497 U.S. 227, 239 (1990); *Butler*, 494 U.S. at 413; *Teague*, 489 U.S. at 306); *see also Saffle*, 494 U.S. at 486 (viewing the *Teague* doctrine as a "limitation on the proper exercise of habeas corpus jurisdiction").

[2] *Teague*, 489 U.S. at 310, 311-13 (plurality opinion); *see also Stringer v. Black*, 503 U.S. ___, 112 S.Ct. 1130, 1135, 117 L.Ed.2d 367, 376 (1992); *Sawyer*, 497 U.S. at 241-42; *Butler*, 494 U.S. at 412; *Penry v. Lynaugh*, 492 U.S. 302, 313, 329 (1989).

[3] *See, e.g., Stringer*, 503 U.S. at ___, 112 S.Ct. at 1135, 117 L.Ed.2d at 377 ("The interests in finality, predictability, and comity underlying our new rule jurisprudence may be undermined to an equal degree by the invocation of a rule that was not dictated by precedent as by the application of an old rule in a manner that was not dictated by precedent."); *Penry*, 492 U.S. at 314 (noting finality concerns under retroactivity doctrine); *Teague*, 489 U.S. at 308 (plurality opinion) (discussing the federalism and criminal justice interests of comity and finality).

[4] *See Butler*, 494 U.S. at 414; *see also Sawyer*, 497 U.S. at 234; *Saffle*, 494 U.S. at 488; *Teague*, 489 U.S. at 310 (plurality opinion).

This case concerns the application of the second *Teague* exception and whether this exception may effectively abrogate the general *Teague* principle against retroactive application of new rules on federal habeas review. The second *Teague* exception permits the application and announcement of new rules on collateral review which involve " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle*, 494 U.S. at 495.[5] Quite simply, if the second exception is construed broadly, then the important finality and comity interests recognized by this Court will be undermined and reasonable, good-faith state court rulings will be disregarded. The question on when the second exception to the *Teague* doctrine applies therefore challenges the integrity of the general principle.

b. The Second Exception and the Recognized "Latent Danger"

While much of the *Teague* doctrine is premised upon the retroactivity principles first advanced by Justice Harlan,[6] this Court modified Justice Harlan's proposal in

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[5] The first *Teague* exception "applies to new rules that place an entire category of primary conduct beyond the reach of the criminal law, or new rules that prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense." *Sawyer*, 497 U.S. at 241 (citations omitted); *see also Saffle*, 494 U.S. at 494; *Penry*, 492 U.S. at 329, 330.

It is not disputed that the first exception is not applicable to this case.

[6] *See Mackey*, 401 U.S. at 681-95 (Harlan, J., concurring and dissenting); *Desist v. United States*, 394 U.S. 244, 260-65 (1969) (Harlan, J., dissenting); *see generally Teague*, 489 U.S. at 312 (plurality opinion).

order to avert "a latent danger" which would result from a second exception which was so broad it could swallow the general rule of non-retroactivity. *See Butler*, 494 U.S. at 416. Consequently, this Court limited the scope of the second exception by adopting two separate components which must first be satisfied before any new rule may be retroactively applied or announced on collateral review under the second *Teague* exception. *See, e.g., Sawyer*, 497 U.S. at 242 (noting history of and rationale for two parts to second exception).

First, the new rule must "seriously diminish the likelihood of obtaining an accurate conviction." *Teague*, 489 U.S. at 315 (plurality opinion). As Justice Harlan articulated this aspect of the exception, "all 'new' constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas." *Desist*, 394 U.S. at 262 (Harlan, J., dissenting). *Second*, the new rule must also be a "watershed" rule of criminal procedure which "alter[s] our understanding of the *bedrock procedural elements*" prerequisite to the fundamental fairness of the criminal proceeding.[7] Accordingly, under the second *Teague* exception, both the accuracy element *and* the watershed rule element must be met before the criminal justice interests in finality and comity will be disturbed by the retroactive application of a new rule on collateral review. *See Sawyer*, 497 U.S. at 242.

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[7] *Teague*, 489 U.S. at 311 (plurality opinion) (emphasis in original) (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part); *see also Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part) (referring to "those procedures that . . . are 'implicit in the concept of ordered liberty' ") (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

As discussed below, the "latent danger," expressed as a mere possibility and legitimate concern by this Court in *Butler*, is becoming an actuality. The Fourth Circuit construed and applied the second *Teague* exception broadly in *Dixon*, 961 F.2d at 454-56, by holding that this Court's decision in *Mills v. Maryland* could be retroactively applied on collateral review under this exception. That decision has compelled resentencing in *Dixon*, a ten-year old capital case. Because the *Teague* doctrine applies to post-conviction proceedings in Maryland, the Circuit Court for Somerset County, Maryland in this case felt obliged to follow the Fourth Circuit rationale in *Dixon*.

The ramifications of these decisions by the Fourth Circuit and the Maryland state court may affect other similar cases involving the *Mills* decision. More important than the actual number of cases impacted by the retroactive application of *Mills* is the fact that the broad application of the second *Teague* exception in this case is indicative of a larger "latent" problem in the lower courts. Until this Court furnishes positive guidance on the type of analysis required under the second *Teague* exception, many presumptively valid and final convictions and sentences will be set aside, undermining substantial finality and comity interests.

II. The Existing Conflict Whether the New Rule of *Mills v. Maryland* May Satisfy the Second *Teague* Exception Provides An Opportunity for This Court to Furnish Guidance to the Lower Courts On the Scope of Both Aspects of the Second *Teague* Exception

a. This Case Presents An Opportunity to Clarify the Scope of the Second *Teague* Exception

The direct review process in this case was concluded on October 6, 1986. *See generally Griffith*, 479 U.S. at 321 n.6. Twenty months later, this Court decided *Mills v. Maryland*, 486 U.S. 367 (1988), striking down instructions requiring a jury to first *unanimously* find the existence of a mitigating factor before the jury could consider the mitigating evidence. Despite the presumptively valid and final conviction, on post-conviction review before the state court, respondent Grandison argued that he should nonetheless obtain the benefit of the new rule in *Mills*. The Circuit Court for Somerset County in Maryland accepted this argument by relying upon the Fourth Circuit's holding that the rule in *Mills* satisfied the second exception under the *Teague* doctrine. *See Dixon*, 961 F.2d at 454-56.

Unlike the state court below, other courts which have considered the *Mills* holding have concluded that it constitutes a new rule, within the meaning of the *Teague* doctrine, which may not be retroactively applied on collateral review.[8] If the *Mills* holding satisfies the second

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[8] *See Wilcher v. Hargett*, 978 F.2d 872, 878 (5th Cir. 1992); *Cordova v. Collins*, 953 F.2d 167, 173 (5th Cir. 1992), *petition for*

exception, then this exception may swallow the general rule against applying new rules on collateral review.

In addition to resolving the present conflict on whether the *Mills* rule may be retroactively applied under the second *Teague* exception, this case also presents an opportunity for the Court to provide guidance to the lower courts on an important habeas issue. Until clarity is provided on the scope of the second *Teague* exception, the lower courts will continue to wrestle with the application of this exception, allowing for the development of new rules on collateral review.

This Court has yet to decide a case where the second *Teague* exception applies. To date, the primary example of a rule satisfying this exception is the right to representation by counsel in all criminal trials for serious offenses. *See Gideon v. Wainwright*, 372 U.S. 335 (1963); *see also Saffle*, 494 U.S. at 495; *Teague*, 489 U.S. at 311-12.

This Court has twice acknowledged that the specific boundaries of this exception have yet to be illuminated.[9] Further, *Teague* noted the narrowness of the second exception: "Because we operate from the premise that such

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cert. filed; see also Zettlemoyer v. Fulcomer, 923 F.2d 284, 317 n.3 (3rd Cir.) (Sloviter, J., dissenting), *cert. denied*, 112 S.Ct. 280 (1991); *McDougall v. Dixon*, 921 F.2d 518, 539 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 2840, *stay denied, cert. denied*, 112 S.Ct. 334 (1991); *Thomas v. Jones*, 742 F. Supp. 598, 601-02 (S.D. Ala.), *aff'd in an unpublished opinion*, ___ F.2d ___ (11th Cir.), *cert. denied, stay denied*, 497 U.S. 1042 (1990).

[9] *See Graham v. Collins*, 61 U.S.L.W. 4127, 4132 (1993) (noting "[w]hatever the precise scope of this exception"); *Saffle*, 494 U.S. at 495 ("The precise contours of this exception may be difficult to discern.").

procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many [] components of basic due process [central to an accurate determination of innocence or guilt] have yet to emerge."[10]

If, in fact, there are few remaining watershed rules affecting the fundamental fairness and accuracy of the criminal proceeding, then it is highly unlikely in the near future for guidance to come from this Court in a case involving the application of such a watershed rule of criminal procedure. Therefore, any guidance to lower courts is likely to come in a case where the second exception is *not* satisfied. Until greater guidance is provided, some lower courts will be able to undermine the finality and comity interests advanced by the *Teague* doctrine by stepping into the void created by the unarticulated contours of the second exception.

b. This Case Presents An Opportunity to Resolve the Existing Conflict Over the Scope of the Accuracy Element of the Second *Teague* Exception

The lower courts are split on the scope of the accuracy element of the second exception concerning the impact of the new rule on the likelihood of obtaining an accurate conviction. The conflict is whether "some" mere

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[10] *Teague*, 489 U.S. at 313 (plurality opinion); *see also Graham*, 61 U.S.L.W. at 4132 (noting second exception "is clearly meant to apply only to a small core of rules"); *Sawyer*, 497 U.S. at 241 (referring to the narrowness of both exceptions); *Saffle*, 494 U.S. at 488 (same).

impact on the fact-finding process is required or whether a significant or substantial impact is necessary before the accuracy element is met.

In *Williams v. Chrans*, 945 F.2d 926, 945 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 3002 (1992), the Seventh Circuit was presented with the question of whether *Batson v. Kentucky*, 476 U.S. 79 (1986) (concerning the burden of proof to determine whether the prosecutor has impermissibly used peremptory challenges to exclude veniremen on account of race), should be retroactively applied under the *Teague* doctrine. In considering the accuracy element of the second exception, the Seventh Circuit relied upon this Court's pre-*Teague* decision of *Allen v. Hardy*, 478 U.S. 255, 259 (1986) (per curiam). One of the factors assessed by the *Allen* Court was whether retroactive application of *Batson* "is designed to enhance the accuracy of criminal trials." *Id.* (quoting *Solem v. Stumes*, 465 U.S. 638, 643 (1984)). The Seventh Circuit, in quoting *Allen* and applying the *Teague* standard, acknowledged that the new rule of *Batson* would have "some" impact on the fact-finding function, but that impact alone was insufficient. *See Chrans*, 945 F.2d at 945. Thus, at least one federal court has reasoned that the *Teague* doctrine requires more than "some" impact before the accuracy element is established. Language of the *Teague* decision supports this conclusion, suggesting that a threshold level (i.e., "serious" or "significant" impact) must be crossed before the accuracy element is satisfied by the proposed new rule.[11]

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[11] *See Teague*, 489 U.S. at 315 (plurality opinion) (noting the new rule must "*seriously* diminish the likelihood of obtaining an

In stark contrast is the liberal application of the accuracy element by the Fourth Circuit, which was completely relied upon by the state court in this case. *See Grandison*, No. 4010, slip op. at 17, *reprinted in* App. to Pet. for Cert., at 15a-16a. In *Dixon*, 961 F.2d at 454, the Fourth Circuit misquoted and misapplied this Court's opinion in *Sawyer* to conclude that the accuracy element is essentially satisfied as long as there is "some" impact by the new rule on the likelihood of obtaining a conviction. In citing to *Sawyer*, the Fourth Circuit concluded the accuracy element was "easily" met and noted that "it was because *every* Eighth Amendment case concerning capital punishment does meet the first requirement of the second *Teague* exception that the [U.S. Supreme] Court refused to adopt Sawyer's interpretation of the exception." *Dixon*, 961 F.2d at 454 (emphasis added). Thus, the Fourth Circuit concluded that the *Mills* rule satisfied the first aspect of the second exception since it was merely "aimed at increasing the accuracy of capital sentencing." *Id.* at 455.[12]

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accurate conviction") (emphasis added); *id.* at 313 ("limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is *seriously* diminished") (plurality opinion) (emphasis added); *see also Desist*, 394 U.S. at 262 (Harlan, J., dissenting) (noting "all 'new' constitutional rules which *significantly* improve the pre-existing fact-finding procedures are to be retroactively applied on habeas") (emphasis added).

[12] Other courts have also suggested that they too employ a mere impact test. *See, e.g., Adams v. Aiken*, 965 F.2d 1306, 1312 (4th Cir. 1992) (noting "[i]t is quite evident that [the] rule [in *Cage v. Louisiana*, 498 U.S. 39 (1990) concerning reasonable doubt instructions] eliminates confusion and improves the accuracy of a trial," but concluding the watershed rule element was not satisfied), *petition for cert. filed.*

Sawyer did not hold that (1) the accuracy element requires only a "mere impact" test, or (2) all new rules proposed under the Eighth Amendment automatically satisfy the accuracy element. Instead, as this Court aptly observed, "It is difficult to see any limit to the definition of the second exception if cast as proposed by petitioner." *Sawyer*, 497 U.S. at 243. The same can be said of the liberal construction of the accuracy element by the Fourth Circuit.

Serious questions concerning the availability of the *Teague* doctrine are raised by this split of lower court authority. Is there anything left of the accuracy element if the petitioner need only show that the proposed new rule has "some" impact on the fact-finding process? At what point is the accuracy element meaningfully satisfied: Is mere enhancement of the accuracy of the trial all that is required or is some significant threshold level necessary? Will the accuracy element always be satisfied in Eighth Amendment cases, as suggested by the Fourth Circuit and the state court in this case? What "narrowness" remains of the second exception if the accuracy element can be so easily satisfied? What articulable purpose is advanced by this element if it can be met by most proposed new rules of criminal procedure? This split of authority and these questions alone warrant consideration of this case by this Court.

c. This Case Presents An Opportunity to Resolve the Present Divergence Over the Scope of the Watershed Rules Element of the Second *Teague* Exception

There is also a divergence among the lower courts over the scope of the second element of the second *Teague*

exception regarding "watershed" rules of criminal procedure.

In *Dixon*, the Fourth Circuit held that *Mills v. Maryland*, 486 U.S. 367 (1988) and *McKoy v. North Carolina*, 494 U.S. 433 (1990), "are 'bedrock procedural elements' and are 'implicit in ordered liberty.' " *See* 961 F.2d at 456. In reaching this conclusion, the Fourth Circuit referred to the evolving standards of decency standard under the Eighth Amendment; the unique sanction of the death penalty; the requirement of individualized sentencing for the death penalty; the arbitrary and capricious nature of a unanimity requirement; and the contention that the unanimity requirement "has the same 'primacy and centrality' of *Gideon*." *Id.* at 455-56. The state court in this case was persuaded by the *Dixon* opinion. *See Grandison*, No. 4010, slip op. at 17-18, *reprinted in* App. to Pet. for Cert., at 15a-16a. It is difficult to discern many Eighth Amendment rules which would not qualify under the watershed rules element as construed by the Fourth Circuit.

In a non-capital case, a similar broad application of the watershed rules element was recently afforded by the Second Circuit in *Graham v. Hoke*, 946 F.2d 982, 994 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 890 (1992). In issue was the retroactive application of *Cruz v. New York*, 481 U.S. 186 (1987), holding that "where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him." *Id.* at 193 (citation omitted). In an alternative holding, the Second Circuit held the second

element of the second *Teague* exception was satisfied because the constitutional right of confrontation was "implicated." *Hoke*, 946 F.2d at 994. Notwithstanding the importance of the *Cruz* holding and the Confrontation Clause, the question raised by this rationale is what other fundamental constitutional rights may similarly qualify under the watershed rule exception? These decisions are contrary to the observation in *Teague* that it is "unlikely that many [] components of basic due process have yet to emerge." *Teague*, 489 U.S. at 313 (plurality opinion).

In contrast to these decisions, and consistent with this Court's opinions limiting the availability of the second exception, the Fifth Circuit has held that this exception is available only for those new constitutional rules "designed to redress constitutional violations that so distort the judicial process as to leave one with the impression that there had been no judicial determination at all, or else skew the actual evidence crucial to the trier of fact's disposition of the case." *Skelton v. Whitley*, 950 F.2d 1037, 1044-45 (5th Cir.) (citations and internal quotations omitted), *cert. denied*, 113 S.Ct. 102 (1992). This Fifth Circuit formulation is predicated on the classic examples justifying habeas review, including "that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods." *Teague*, 489 U.S. at 313-14 (plurality opinion) (quoting *Rose v. Lundy*, 455 U.S. 509, 544 (1982) (Stevens, J., dissenting) (footnotes omitted)); *see also Sawyer v. Butler*, 881 F.2d 1273, 1294 (5th Cir. 1989) (en banc), *aff'd sub. nom., Sawyer v. Smith*, 497 U.S. 227 (1990). It is clear from these cases that the application of

the second *Teague* exception is receiving disparate treatment in the lower courts.

Significant questions requiring resolution by this Court are raised by this divergent authority as well. If the accuracy element is to be broadly applied, then the finality and comity interests advanced by the *Teague* doctrine will hinge entirely on the application of the watershed rules element. Given the split of lower court authority, one may legitimately question whether the second exception may be permitted to swallow the general rule of nonretroactivity under the *Teague* doctrine. The prior pronouncements of this Court as to the "narrowness" of both exceptions have not precluded lower courts from liberally applying the second exception. This appears to be a consequence of the absence of affirmative guiding principles from this Court on this issue. This case provides an opportunity for this Court to furnish guidance on these questions and to preserve the integrity of this important doctrine. Ultimately, the issue is how far the "latent danger," acknowledged during the inception of the *Teague* doctrine, will spread. *See Butler*, 494 U.S. at 416.

d. This Case Also Presents An Opportunity to Clarify the Relevance and Role of Finality and Comity to the Application of the *Teague* Exceptions

This Court has previously noted that "[t]he scope of the *Teague* exceptions must be consistent with the recognition" of the finality and comity interests at stake and the

costs of collateral review imposed upon the States. *Sawyer*, 497 U.S. at 242. In explicating the scope of the second *Teague* exception, this case also provides an opportunity to discuss the direct relevancy of these criminal justice interests to the application of the exceptions. For example, some lower court decisions merely consider whether the proposed new rule qualifies under the second exception without discussing the limited scope of collateral review and the finality and comity concerns at stake. *See, e.g., Dixon*, 961 F.2d at 454-56. Since these interests furnish the primary basis for the *Teague* doctrine, they should not be lost by the broad application of the *Teague* exceptions by lower federal courts. If the scope and the application of the *Teague* exceptions are to be consistent with the general principle against retroactivity, then it is appropriate that the impact on finality and comity interests be assessed as part of any application of the *Teague* exceptions.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant the petition for a writ of certiorari.

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